IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 60 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUNAFBHAI MOHMAD ARIF VOHRA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MEHUL SHARAD SHAH for Appellant(s) : 1,
MR.A.J.DESAI, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 15/02/2007

ORAL JUDGMENT

Present appeal is preferred by the appellant-accused against the judgment and order of conviction and sentence passed by the learned Special Judge,

Mehsana in Essential Commodity Case No.4 of 1992, on 31st December, 1994 whereby the appellant-accused has been sentenced to undergo rigorous imprisonment for six months and has been ordered to pay a fine of Rs.3000/-, in default thereof, to undergo rigorous imprisonment for 15 days. The learned Judge after conclusion of the trial found that appellant-accused is found guilty of charge of the offence punishable under Section 7 of the Essential Commodities Act, he has violated the conditions of Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order, 1981.

2. Mr.Mehul Sharad Shah, learned Advocate for the appellant, has taken me through the various grounds of challenge, entire judgment and order of conviction and sentence, as well as, relevant part of the oral as well as documentary evidence led during the course of trial. To appreciate the submissions made before the Court, it would be proper to state the facts of the present case in brief.

3. It is the say of the prosecution that Officer of the Civil Supply Department had inspected the premises of the appellant-accused on 13th December, 1990 and found certain irregularities and illegalities. He, therefore, prepared a detailed report and the same was submitted to the Collector, Mehsana and Collector, Mehsana ultimately

decided to institute a criminal proceedings in Criminal Court for offence punishable under Section 7 of the Essential Commodities Act. It is also alleged that during inspection 12 irregularities were found and therefore, the appellant-accused was served with notice to explain about the irregularities mentioned in the notice. The notice was responded by the accused with written explanation on 28th October, 1991. It is not necessary to enumerate all the 12 irregularities mentioned in the notice to show-cause because the same is referred to by the learned Judge in his judgment and order under challenge and they are also mentioned in detail in deposition of Prosecution Witness No.1, Vaghela Laxmansinh Vajesinh, who has been examined at Exh.16. The said irregularities were also referred to in the relevant documents tendered by this witness which are at Exhs.18 and 19, so also, the order of the Collector at Exh.17, whereby he had recorded and ordered to institute criminal proceedings against the appellant-accused.

4. Mr.Shah, during his oral submissions, from the explanation given by the accused under Section 313 of the Code of Criminal Procedure has pointed out to the Court that most of the irregularities are insignificant in nature and the same cannot be said to be grave or offending with criminal intention or with any other ulterior motive to commit the offence. He has submitted

that out of 12 alleged irregularities, either Collector or the trial Court has accepted the explanation of the appellant-accused qua the irregularities No.3, 4, 7, 11 and 12. On the other hand, the explanation given qua irregularities No.1, 2, 5, 6, 8 and 9 was not found satisfactory either by the trial Court or the Collector. So far as irregularity No.10 is concerned, it was alleged that the accused was not showing the rate of kerosene per liter which can be shown on the display board with a view to comfort the customers. It is observed that this type of irregularity can be inferred with criminal intention. This is possible together from the discussion made by the Collector as well as the learned trial Judge.

5. According to the learned trial Judge the irregularity Nos.1 and 2 as regard the non-issuance of bills against the sale of kerosene was explained by the accused that, during the course of inspection no fault was found so far as bill already issued earlier and subsequent to this, gap was found by the Inspecting Authority and this was because of non-availability of bill-book with the accused and he has maintained the names of the customers who had purchased the kerosene from his depot, but the learned Judge has observed that register ought to have been produced before the Court or shown to the Collector. But, on perusal of the record it is not even the say of the Officer who had made

inspection that no such register was found or seen by them. In the same way while submitting explanation of irregularity No.5, the accused has accepted that he has sold kerosene as a whole-seller to three dealers / distributors against the instructions given by the Mamlatdar, Vadnagar. These three dealers / distributors were asked to draw their stock of kerosene from a whole seller having licence and business premises at Kheralu. It was the say of the accused before the Court and the Collector that as people from Vadnagar Town were facing hardship, he was orally instructed by Mamlatdar, Vadnagar to sell kerosene to three persons mentioned in the notice to show-cause and he had received a written order in conformity of the oral instructions given by the Mamlatdar. Therefore, this is an admission as to issuance of the prohibitory order by the competent authority and the Court has observed that the accused ought to have produced the original order or at least the copy of it before the Court with explanation under Section 313 of the Code of Criminal Procedure. So, this excuse as a layman is unacceptable. But, it is also an argument of Mr.Shah that it is neither alleged nor proved that three dealers / distributors, to whom the accused had sold the kerosene, had never received such stock or it was directly or indirectly siphoned off by the accused with the help of those three dealers / distributors. Therefore, it ought not to have been considered as grave

illegality and was required to be equated with non-compliance of the written instructions given by the authority. There are no allegations of either black marketing or over pricing against the accused. So far as irregularity No.8 is concerned, the accused had explained that in what circumstance he had sold more than 10 % kerosene to the customers from the entire stock drawn by him. The appellant was holding two types of licence viz. one as a whole seller and another as a retailer. So, he was asked to sell kerosene in a particular quantity to the retailer i.e. 10 % and the sell was found in excess of the percentage prescribed and the Court found that the explanation given by the accused is not acceptable otherwise the documentary evidence could have been produced before the Court. That is one more irregularity which was not found acceptable to the Collector and the learned Judge has also observed that explanation is not convincing regarding issuance of bills of 10 liters and 15 liters to number of customers. The explanation given by the accused was that because of rush instead of issuing bill for 1 or 2 liter to small customers, he was issuing bills of more liters to such customers who were purchasing kerosene. He was doing this type of practice as a matter of convenience to the people at large and himself; otherwise, there was no restriction as such even as per the guidelines of selling kerosene about 10 liters. One customer was otherwise entitled to purchase

18 liters of kerosene and when no bill was found in excess of that outer limit fixed by the Government and the guidelines, the same could not have been viewed as gross violation of any guidelines or any conditions of licence.

6. There is no substance in the say of prosecution qua only one irregularity is noticed out of 12 irregularities mentioned in the notice and the complaint.

7. After some deliberation, Mr.Shah submitted to the Court that his alternative submission may be focused and if the Court finds that the accused was responsible for any one of the irregularities and the conviction is sustainable then on confirmation of conviction, the accused should not be asked to go to jail and should be given benefit under the Probation of Offenders Act and / or under the scheme of Section 360 read with Section 361 of the Code of Criminal Procedure. As such he has concentrated his argument on this alternative plea and has not pressed the finding of conviction, it is not necessary to discuss the oral as well as documentary evidence in detail in the background of submissions made by Mr.Shah and learned A.P.P. Mr.Desai. Mr.Shah, has also tendered one affidavit in support of his argument which is also taken on record. He has placed reliance in case of **(The) State of Gujarat Vs. Ganpatbhai Premjibhai**

Joshi, reported in 1998 (2) G.L.H. 787. He has also produced certain documents in support of the contents of the affidavit and it has been pointed out by Mr.Shah that even the Collector, Mehsana considering the explanation ultimately permitted to continue the appellant with the same business as there was no complaint of overpricing or black marketing against the appellant-accused. For two major irregularities, the Collector has observed that the explanation is not found acceptable only because the appellant has failed in producing the documents in support of his say. It is not the finding of the Collector that the explanation given by the accused is either false or concocted otherwise, the Collector would have been clear on the point quoting the say of Mamlatdar, Vadnagar that explanation of the accused is baseless and false. The complainant had not even cared to cite the Mamlatdar, Vadnagar as witness otherwise the accused would have defended himself in a much better way. Mr.Shah has submitted that in such a situation the accused should not be sent to Jail and he should be given the benefit.

8. In furtherance of this alternative submission, Mr.Shah has drawn the attention of this Court to one more judgment of the Apex Court in case of **Nathulal Vs. State of Madhya Pradesh, reported in A.I.R. 1966 S.C. 48**

(VOL.52 C12). According to Mr.Shah, when the irregularities mentioned in the notice to show-cause and the complaint if read, are sufficient that these irregularities are not of grave nature, then the element of mens rea should not be presumed and when Collector himself has permitted the appellant-accused to continue with the same business and his licence was also renewed by the competent authority, the reformation theory should be applied.

9. The Court should also see the date on which the offence was lodged and the actual quantum of punishment imposed by the trial Court. Even, otherwise, this Court could have reduced the substantive sentence from six month to a week or 15 days by increasing the amount of fine. The accused, if is asked, is ready to pay additional amount of fine and therefore, the Court should exercise its discretion in favour of the accused.

10. Whether the amount of fine can be enhanced if the appeal for enhancement is not preferred by the State, is also a question. But, the submission made by Mr.Shah has some logic that ultimately the accused is put to some advantage and he shall remain exempted from serving the sentence imposed by the trial Court and in case of breach of any condition of the bail bond executed for good behaviour, the appellant-accused may be sent to prison

for serving the sentence imposed by the learned trial Court.

11. Mr.Shah, in support of his argument has also placed reliance to one judgment in case of **Harivallabha and Another Vs. State of Madhya Pradesh, reported in (2005) 10 S.C.C. 330**. He has submitted that in this cited decision the accused was given benefit of Section 360 read with Section 361 of Criminal Procedure Code instead of serving substantive sentence. It would be proper to reproduce the relevant paragraphs of this judgment.

"3. Learned Counsel appearing on behalf of the appellants submitted that the appellants are first offenders and in the facts and circumstances of the case they should have been dealt with under the provisions of Section 360 of the Code of Criminal Procedure, 1973 (for short "the Code") and the High Court reduced the sentence of imprisonment from three years to three months without recording any reasons, as required under Section 361 of the Code, which lays down that for special reasons to be recorded, a court can refuse to release a person on probation of good conduct under Section 360 of the Code. In our view, in the facts and circumstances of the present case, the appellants should have been dealt with under the provisions of Section 360 of the Code.

4. Accordingly, the appeal is allowed in part and while upholding the conviction and sentence of fine awarded to the appellants, sentence of imprisonment awarded against them is set aside and the trial Court is

directed to deal with them under the provisions of Section 360 of the Code. The appellants, who are on bail, are discharged from the liability of bail bonds."

12. As there is no allegation either of black marketing or of overpricing and the accused was permitted to continue with the same business by the competent authority for several years, he may be given the benefit as it was given in case before the Hon'ble Apex Court in the cited decision.

13. According to learned A.P.P., Mr.Desai, accused has not assailed the legality and validity of the conviction, the Court may pass any appropriate order qua the substantive sentence.

14. In the result, present Criminal Appeal is partly allowed. While confirming the judgment and order of conviction and sentence of fine passed by the learned Special Judge, Mehsana in Essential Commodity Case No.4 of 1992 on 31st December, 1994, the order of sentence is hereby altered.

14.1 The period of substantive sentence imposed by the trial Court is reduced to the period of three months. However, the appellant-accused is given the benefit of probation under Section 4 of the Probation of Offenders Act read with Section 361 of the Criminal

Procedure Code, 1973. The appellant-accused is directed to execute a bond of good behaviour with one surety of Rs.5,000/- for a period of one year under the scheme of Section 4 of Probation of Offenders Act read with Section 361 of Criminal Procedure Code, 1973. Bond to be executed before the concerned trial Court. The substantive sentence altered and reduced to three months obviously shall remain under suspension till the period of bond of good behaviour i.e. for one year.

14.2 The appellant-accused is also directed to execute a bond of good behaviour of Rs.5,000/- with one surety before the trial Court within period of 15 days from today, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court.

14.3 The appellant-accused is also directed that in case of violation of any of the conditions of the bond of good behaviour, the trial Court shall at liberty to issue warrant for serving the sentence imposed by the concerned trial Court.

14.4 The Bail Bond executed by the appellant-accused shall stand discharged on the date on which the appellant-accused executes the bond of good behaviour

before the trial Court. Order and Direction accordingly.

(C.K.BUCH, J.)

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